IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1749

FREDDY DUANE BLAKLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPF EME COURT

The Petitioner, Freddy Duane Blakley, respectfully prays that a writ of certiorari issue to review the decision and judgment of the Supreme Court of Florida denying certiorari to the Fourth District Court of Appeal of Florida without opinion, which appellate decision affirmed without opinion the judgment of the Seventeenth Judicial Circuit Court of Florida convicting the Petitioner of sexual battery contrary to Florida Statute 794.011(3).

OPINIONS BELOW

The Order of the Supreme Court of Florida denying certiorari in Supreme Court of Florida Case No. 55,252, *Freddy Duane Blakley v. State of Florida*, was unpublished, as was the appellate decision of the court below, the Fourth District Court of Appeal of Florida. Copies of all of the appellate opinions below are attached to this Petition and made a part of it. The copies of opinions which are contained in the Appendix are: (1) The split per curiam affirmance without opinion of the conviction of Freddy Duane Blakley, Fourth District Court of Appeal of Florida Case No. 77-2076, including the written dissenting opinion of Judge Dauksch; The denial of the motion for rehearing in the same appellate court; and the denial of certiorari by the Supreme Court of Florida. Under Florida Rule App. P. 9.330(d), no motion for rehearing is allowed on a denial of certiorari.

JURISDICTION

Petitioner, Freddy Duane Blakley, respectfully requests this Court to review the judgment of the Supreme Court of Florida entered on February 28, 1979, denying certiorari to the Fourth District Court of Appeal of Florida. No motion for rehearing was allowed under Florida law.

Petitioner respectfully invokes this Court's jurisdiction pursuant to the provisions of 28 U.S.C. § 1257 (3). Petitioner claims infringement of rights and privileges guaranteed by the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

Did the trial court commit intolerably prejudicial error in violation of the Due Process Clause of the Fourteenth Amendment in allowing, over repeated defense objections and a motion for a mistrial, the prosecutor to repeatedly

and intentionally elicit from two police officers in the State's case in chief the fact that the Accused exercised his constitutional right against self-incrimination while undergoing post-arrest custodial interrogation after his *Miranda* warnings had been read to him on three separate occasions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes (1976)

"794.011 Sexual battery"

"(1) Definitions:"

"(3) "Serious personal injury" means great bodily harm or pain, permanent disability, or permanent disfigurement."

"(3) A person who commits sexual battery upon a person over the age of eleven (11) years, without that person's consent, and in the process thereof uses actual physical force likely to cause serious personal injury shall be guilty of a life felony, punishable as provided in § 775.082, § 775.083, or § 775.084." (Requiring a minimum period of incarceration of thirty years)

STATEMENT OF THE CASE

Facts. On February 6, 1976, the Petitioner, Freddy Duane Blakley (hereinafter "the Accused"), was arrested at 8:00 P.M. for the offense of sexual battery which had allegedly occurred only moments before in the parking lot of the Swinging Door Lounge, a bar in Wilton Manors, Florida. The Accused was read his *Miranda* rights from a rights card at the time of his arrest, and was transported back to the Wilton Manors Police Department. At the police station he was stripped of his clothing for potential evidentiary use. He was later taken into the detective bureau by several detectives at a little later than 2:00 A.M. the following morning, February 7, 1976. There he was interrogated for one and one half to two hours. Before this session he was again advised of his *Miranda* warnings and each warning was explained to him, the Accused noting that he understood. The Accused was then presented with a rights waiver and again went over his *Miranda* rights with the interrogating officers before signing the form. After these procedures, the Accused refused to answer any

questions, a posture which he steadfastly maintained from the moment of his arrest throughout his custodial interrogation.

According to the victim, the sexual battery happened in her automobile in the parking lot of a bar. Her assailant bumped her into the car with his hip and grabbed her around the throat with one hand while reaching back with the other to close the car door. Just before this, the assailant was holding the car door for her and offering his assistance. The victim claimed that the grip on her neck was so great that she could not breathe, much less scream. Her assailant, while choking her about the neck, was shaking her so hard that she could not even exhale. At one point in the choking, the victim thought she was dead from the strangulation. Her assailant then slapped her when she tried to scream and ordered her into the back seat where the sexual battery was completed.

After the sexual battery, the assailant picked up a roller skate and asked the victim what it was. Moments later, the victim got out of the car and ran into the bar and returned with her boyfriend and a mutual friend, Linda Gadson. There was some conflict in the State's case as to whether the Accused was standing in the parking lot when the boyfriend came out and had to give chase for a half a block, or whether the Accused was down on the ground just outside the bar when the three people came out of the bar. Regardless, the Accused was detained by civilians and hit in the head by at least two of them before the police came.

The State charged the Accused by information with the offense of sexual battery involving the use of great force, contrary to Florida Statute 794.011(3) (1976), under the theory that he had forced the victim into submission by almost choking her to death. That degree of force, if proved, requires that the trial judge impose a minimum period of incarceration of thirty years.

The Accused filed a notice of intent to rely on a defense of insanity at trial, and a jury trial was held.

At trial, it was established that the victim was the only eyewitness to the alleged sexual battery. In spite of the force which she claimed was exerted upon her, the Caucasian victim had no marks on her neck or face. The crime scene was processed, yet there were no fingerprints of the Accused found anywhere, including on the skate, car door handle, or interior of the car. No identifiable pubic hair or serological evidence was found in the car. In spite of the recency of the arrest following the event, the serological evidence was inconclusive.

During the State's case in chief, the prosecutor called Officers Richard William Biggs and Ken Kreulen of the Wilton Manors Police Department. Their testimony consisted of forty three (43) pages of transcript, most of which was dedicated to establishing that the Accused exercised his Fifth Amendment privileges to remain silent while undergoing post-arrest, custodial interrogation after his *Miranda* warnings were read and explained to him on three separate occasions.* This testimony was elicited over repeated defense objections, a standing objection, and a motion for mistrial. These due process violations form the basis of this Petition for Certiorari. The factual details of these repeated violations will be covered in the following section of this Petition addressing how the issue and federal question were preserved for review.

Once the State rested, the Accused moved for a judgment of acquittal, which was denied. The defense then called five psychiatrists and psychologists to support the theory that the Accused was insane at the time of the offense, if he

*The entire transcript of testimony of Detectives Biggs and Kreulen is included in a separate Appendix to this Petition. The Appendix is numbered with the original page numbers of the transcript to facilitate easy reference.

committed it. The Accused did not take the stand. The thrust of the defense was that the Accused suffers from a condition of pathological alcohol intoxication. The condition is such that relatively small amounts of alcohol will cause an allergic-type reaction, resulting in irrational behavior followed by amnesia. The Accused is of American Indian extraction, and PAI is relatively common among American Indians. The five defense doctors testified that the Accused suffered from PAI, had amnesia about anything that may have happened while he was undergoing the allergic reaction, and was insane at the time of the offense.

On rebuttal, the State brought in one psychiatrist who was of the opinion that the Accused was not insane at the time of the offense.

The jury returned a verdict of guilty as charged, and the trial court entered a judgment sentencing the Accused to the mandatory minimum period of thirty (30) years incarceration.

Preserving the Federal Question. The Petitioner took a direct appeal from this conviction. Before doing so, he made a motion for a new trial which included the issue before this Court. The main focus of the appeal was again the issue before this Court, and the Petition for Certiorari filed in the Supreme Court of Florida was wholly focused on the Fifth Amendment privilege and Due Process issue as framed in this Petition.

In the trial court, the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. During the State's case in chief, the prosecutor called the chief investigating detective, Sergeant Richard William Biggs. The jury was immediately excused for a proffer. Tr. 102-103. The thrust of this proffer was that the Accused, while under police custodial interrogation at about 2:00 A.M., some six hours

after his arrest, refused to talk with his interrogating police officers after his *Miranda* rights had been carefully read and explained to him on three separate occasions. Tr. 103-118. When defense counsel made an objection during the proffer, he was reminded that "This is on a proffer, anyway." Tr. 104. The prosecutor closed out his direct examination on the proffer as follows:

> "A My opinion as a police officer with nine years of experience is that the defendant understood his rights as were advised by myself, and he understood them. They were read to him twice by me, personally.
>
> He read, understood the rights waiver and signed the rights waiver, but he would not give us any statement.
>
> MR. SPRINGER: That is the extent of the proffer, Judge." Tr. 109.

At the very close of this proffer, the defense attorney objected to the entire proffer on the basis of *Miranda v. Arizona*. Tr. 117. The trial court overruled the objection. Tr. 118.

The jury was then brought back in and Sergeant Biggs was permitted to testify on direct examination that the Accused was brought into his office in the detective bureau for questioning by Sergeant Kreulen. Tr. 122. The Accused was carefully read his rights and asked if he understood each one. Tr. 122-124. The detective then provided a rights waiver sheet, read it to the Accused and had him read it to himself. Tr. 125. In spite of the trial court's ruling on the proffer, the defense attorney objected:

> MR. LASWELL: It would be fundamental error to what is going on here. I would like to have a continuing objection noted on this entire line of

> questioning, and everything else. Tr. 126. This objection was overruled. Tr. 126.

After this rather detailed presentation assuring that the Accused understood his rights, the detective continued:

> Q. Were his responses or indications all yes to each right?
>
> A. No, sir, he responded no to one of his rights.
>
> Q. Which right was that?
>
> A. The right if he would be willing to talk to us, the police officers, in reference to this case. In reference to what he was there for." Tr. 126-127.

Later on direct examination, Officer Biggs responded to the prosecutor's questioning and reemphasized the Petitioner's refusal to speak with the police while in their custody:

> "A He appeared very calm, collected. He did not give the police officers a hard time. He would not talk to us, but he didn't give us a hard time, either." Tr. 129.

The State completed its direct inquiry of Officer Biggs by offering into evidence the *Miranda* waiver sheet. When the trial judge turned to defense counsel, Mr. Laswell made his continuing objection:

> "Judge, I will rely on the record as it now exists, and repeat my objection on the same ground." Tr. 131.

The *Miranda* waiver form was admitted over objection.

This "interview" of one and one half to two hours duration took place approximately six hours after the Accused was originally detained and arrested by the police, at approximately 2:00 A.M. Tr. 132-133.

At the conclusion of Sergeant Biggs' testimony, the trial court took a short recess. When court resumed, the defense attorney moved for a mistrial outside the presence of the jury.

> "MR. LASWELL: The defendant requests a mistrial at this time for alleging for the reason that it is fundamental error in allowing former detective, now Sergeant Biggs, to testify about the Miranda waiver that it denies the defendant his right guaranteed by the Constitutional rules." Tr. 138.

This motion for a mistrial was denied. Tr. 138-139.

The State next called Detective Sergeant Kreulen, who assisted in the investigation and custodial interrogation of the Accused. The prosecutor having succeeded in getting in front of the jury the fact that the Accused refused to answer Sergeant Biggs' questions, the State did not offer a proffer with Detective Kreulen. Again the State brought out over objection that the Accused was repeatedly read his rights and the State attempted to elicit that the Accused would not answer any questions. During this testimony, the defense attorney made a continuing objection to the Fifth Amendment and Due Process violations, which objection was noted and overruled by the trial court. Tr. 140-141.

After conviction for the offense as charged, the Accused moved for a new trial and as one of the ground averred that the trial court committed reversible error in repeatedly allowing the two police officers who testified to comment on the Accused's refusal to answer any questions after he had been read his *Miranda* rights at least three times, all of this testimony being over timely objection and a motion for a mistrial. The trial court denied this motion and the Fourth District Court of Appeal of Florida affirmed the conviction with a split per curiam affirmance without opinion on July 19, 1978. The issue before the appellate court was virtually identical to the issue raised in this Petition. The Fourth

District Court of Appeal evidently rejected the federal question involved, assuming the majority took an opposite stance from Judge Dauksch's dissenting opinion, which stated in pertinent part:

> On direct examination in the State's case in chief the prosecutor elicited from a policeman the testimony that the defendant had been advised of his rights under *Miranda* and that the defendant maintained his right not to give a statement. After the officer told the jury the defendant exercised his *Miranda* rights the attorney for the defendant objected and moved for a mistrial. In fact, throughout the questioning of the officer in regard to the *Miranda* warnings and the defendant's response, the defendant's attorney made objections and made a "continuing objection" at a point prior to the officer actually telling the jury the defendant refused to make a statement. The officer telling the jury that the defendant refused to give a statement after a *Miranda* warning is error.

The petition for rehearing was denied September 20, 1978. The Accused then immediately petitioned the Supreme Court of Florida for certiorari solely on the basis of the Fifth Amendment privilege and Due Process violations now forming the basis for this Petition. On February 28, 1979, the Supreme Court of Florida denied certiorari without opinion, Acting Chief Justice Adkins dissenting. No petition for rehearing was allowed under Florida law. See Florida Rule of Criminal Procedure 9.330(d).

REASONS FOR GRANTING THE WRIT

The decisions of the Supreme Court of Florida and the Fourth District Court of Appeal of Florida are not in ac-

cord with the applicable decisions of this Court dealing with the substantial federal question of using the Defendant's silence in the face of post-arrest custodial interrogation after the Defendant has been advised of his *Miranda* rights to prove guilt of the Defendant. The decision of the Supreme Court of Florida conflicts directly with *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); and *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975).

In *Miranda v. Arizona*, 384 U.S. at 468, this Court stated:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privileges in the face of accusation.

In *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), the government used the defendant's silence to impeach him on cross examination, maintaining that his silence was relevant to show that his exculpatory version of the facts offered at trial was a recent fabrication. This Court rejected this notion in Hale, observing:

> *** But the situation of an arrestee is very different, for he is under no duty to speak and, as in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does says can and will be used against him in court.
>
> At the time of arrest and during custodial interrogation, innocent and guilty alike — perhaps particularly the innocent — may find the situation so intimidating that they may choose to

stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. See Traynor, the Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U.Chi.L.Rev. 657 676 (1966). He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.

*** Respondent, for example, had just been given the *Miranda* warnings and was particularly aware ofhis right to remain silent and the fact that anything he said could be used against him. Under these circumstances, his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct.

***Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.

> As we have stated before: "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Shepard v. United States*, 290 U.S. 96, 104, 54 S.Ct. 22, 26, 78 L.Ed. 196 (1933). We now conclude that the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact. (Emphasis supplied.)

In *Hale*, there was but one mention of the defendant's exercising his Fifth Amendment privilege, which was immediately followed by a curative instruction. If such cross-examination was intolerably prejudicial, then, *a fortiori*, eliciting such information intentionally and repeatedly in the State's case in chief over repeated objection at least three separate times, without the benefit of a cautionary instruction, calls for a reversal of the case at bar.

Hale employed this Court's supervisory control over the federal courts. In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), this Court extended the rationale of *Hale* to the States through the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. As in *Hale*, the prosecutor in *Doyle* attempted to impeach the defendant's alibi with his post-*Miranda* silence. This Court again noted the fundamental unfairness of using the defendant's silence in such a manner:

> . . . We have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, *see Michigan v. Tucker*, 417 U.S. 433, 443-444, 41 L.Ed.2d 182, 94 S.Ct. 2357 (1974), require that a person taken into custody be advised immediately that he has the right

> to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. *Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. See United States v. Hale*, 422 U.S., at 177, 45 L.Ed.2d 99, 95 S.Ct. 2133. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. 426 U.S., at 617-618 (footnote 8 omitted.) (Emphasis supplied.)

***Mr. Justice White, concurring in the judgment in *United States v. Hale, supra*, at 182-183, 45 L.Ed.2d 99, 95 S.Ct. 2133, put it very well: "When a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony . . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from

> *Miranda* warnings that this would not be the case." 426 U.S., at 618-619.

Fundamental unfairness occurs precisely when the government attempts to use the accused's silence inconsistent with the *Miranda* warnings:

> . . . After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right. 426 U.S., at 618.

Although in *Doyle* and *Hale* this Court was concerned with the use of a Defendant's silence to impeach him once he elects to testify, it should be patently obvious that the error is just as egregious and prejudicial when the silence is used in the state's case in chief as an indication of substantive guilt before the defendant decides whether to testify:

> If, as *Hale* and *Doyle* hold, a defendant's silence cannot be treated as a prior inconsistent statement for impeachment purposes, *a fortiori* it cannot be used substantively as an admission tending to prove the commission of the offense.

Boyer v. Patton, 579 F.2d 284, 288 (3d Cir. 1978). *See also United States v. Henderson*, 565 F.2d 900 (5th Cir. 1978), and *United States v. Impson*, 531 F.2d 274 (5th Cir. 1976).

In the case at bar, the Accused did not testify. Six hours after he was arrested, he was read his *Miranda* rights a second and third time, and these rights were carefully explained to him. He clearly expressed his desire not to talk to the police, which clearly was his absolute right if the *Miranda* warnings were to be taken at face value. In spite of this request, the police kept the Accused under police custodial interrogation for one and one half to two hours at approximately 2:00 in the morning.

Under these facts the Petitioner was intolerably prejudiced and punished for exercising his right to remain silent when the prosecutor was permitted, over repeated objection, to elicit from two of the interrogating police officers that the Accused would not speak to the police after his *Miranda* rights were read to him. In *Doyle* and *Hale*, *supra*, the references to the defendant's exercise of his Fifth Amendment privilege were isolate, whereas in the case at bar the references were repeated and could only serve to highlight the fact that the Accused exercised his right to remain silent. In the case at bar, there was not so much as a curative or limiting instruction. In short, there was not due process afforded the Accused.

Although the Accused had filed a notice of intent to rely on an insanity defense, that issue had not yet been placed before the jury in the State's case in chief, and the State still had the benefit of the presumption of sanity at the time the State elicited the testimony regarding the Accused's remaining silent. Just as in *Doyle* and *Hale*, the challenged evidence was insolubly ambiguous.

The State argued that the evidence was relevant to rebut the anticipated defense of insanity; That the Accused's ability to exercise his Fifth Amendment right to remain silent and to understand *Miranda* warnings was significantly probative of his sanity. Perhaps if the crucial evidence concerned the period immediately after the arrest, as opposed to six hours or more later, the State would have a firmer foundation to stand upon. However, due to the nature of the defense — that of a pathological alcohol intoxication — the evidence was wholly irrelevant. Pathological alcohol intoxication is an allergic reaction to alcohol which occurs when the person afflicted with it reaches a relatively low blood alcohol level. The person suffering from the syndrome still oxidizes alcohol out of his body like any normal person. Therefore, after six hours it would be expected that the trace amounts of alcohol in the

person's system would be fully expelled. The Accused would after that period of time be well below his allergic threshhold and would be expected to act normally. *See generally,* Quantitative Studies on Alcohol Tolerance in Man," *Acta Physiologica Scandinavica,* Vol. 5 Supplement, P. 16 (1943).

The evidence objected to more readily supports the due process concern of *Doyle* that the Accused was merely relying on the *Miranda* warnings given to him by the police and following their apparent advice. The police made doubly sure that the Accused understood his *Miranda* rights, not only reading them three times to the Accused, but having him read the waiver sheet and also explaining the rights to the Accused. The Accused would have had to have been comatose not to understand from the police that he had the right to remain silent. If it was a violation of due process to pull the rug out from under *Doyle* after advising him once that he had the right to remain silent, then how much more so has the Petitioner in the case at bar been denied due process?

The Accused may also have remained silent for several other reasons as enumerated in *Hale* and *Doyle.* Paraphrasing from *Hale,* the Accused may have found the situation so intimidating that he chose to stand mute. He may have been reacting to the hostile and unfamiliar atmosphere surrounding his detention. The Accused had been hit, and perhaps kicked, in the head, yet was not afforded medical attention by the police when he was arrested. The police stripped him of his clothing. In spite of clearly requesting not to speak with the police, the police continued to interrogate him for at least one and one half hours. The Accused had amnesia after the event — whether from the trauma of the blows to the head or from his reaction to the alcohol — and his remaining silent could have been nothing more than his desire to regain his bearings before answering any questions. The police were obviously

not going to let him go, nor were they respecting his constitutional rights. The intolerably prejudicial impact of the repeated testimony about the Accused exercising his privilege to remain silent, coupled with the introduction of the waiver form, was clearly tantamount to punishing the Accused for exercising his rights. This potential for prejudice outweighed any theory of probativity. The State could have couched its questions in terms of the demeanor of the Accused without intentionally infringing on his constitutional rights, if such was the purpose of the State's questions.

Since in the case at bar the errors were repeated and intentional, harmless error cannot result. *See Chapman v. United States,* 547 F.2d 1240 (5th Cir. 1977). The defense was plausible. Five psychiatrists testified to the effect that the Accused, if he committed the alleged act, was insane at the time. Only one psychiatrist for the State testified to a different opinion. Also, the evidence as to the actual commission of a sexual battery, especially as to the element of great force, was not overwhelming. The victim was the only eye witness, and under Florida law her testimony under such circumstance must be especially carefully scrutinized. *Tibbs v. State,* 337 So.2d 788, 790 (Fla. 1976). Although she testified that she was vigorously choked and shaken so that she could not breathe, to the point of believing she was dead, there were no marks on her neck at all. The jury may have improperly inferred from the Accused's silence that it showed guilty knowledge about the degree of force used. Had the jury found that the degree of force was not deadly force, then the Accused would have at most been guilty of violating Florida Statute 794.011 (5), a second degree felony punishable by a maximum of fifteen (15) years, and carrying no mandatory minimum. This potential sentence is considerably less than the thirty (30) year minimum actually imposed.

Under existing Florida law, the lack of any objective evidence that the victim was actually choked raised a colorable argument as a matter of law that the force was insufficient to support a conviction for rape. See, for example, *O'Bryan v. State,* 324 So.2d 713 (Fla.1st DCA 1976); *Bailey v. State,* 76 Fla. 213, 79 So. 730 (1918) (Victim claimed to have been choked around neck); and *Hollis v. State,* 27 Fla. 387, 9 So. 67 (1891) (Nothing to corroberate victim's version that the defendant pressed his forearm against her throat). See also *Morgan v. Hall,* 569 F.2d 1161 (1st Cir. 1978) (Fifth Amendment violation not harmless error where victim claimed her assailant choked her and dug in with his nails, and there was no objective evidence of any trauma to her neck. In *Morgan,* the victim received a broken jaw and there was evidence of intercourse). The intentional, repeated violations of the Petitioner's Fifth Amendment rights were not harmless error. *United States v. Menesses-Davila,* 580 F.2d 888 (5th Cir. 1978); *Boyer v. Patton,* 579 F.2d 284 (3rd Cir. 1978) (Fifth Amendment violation on direct of arresting officer where defense of insanity to be raised); *Johnson v. Patterson,* 475 F.2d 1066 (10th Cir. 1973); *United States v. Henderson,* 565 F.2d 900 (5th Cir. 1978); *United States v. Harp;* 536 F.2d 601 (5th Cir. 1976); and *United States v. Impson,* 531 F.2d 274 (5th Cir. 1976).

This Court should also note that in at least five relatively recent cases addressing a similar issue, the Court vacated judgments based on the rationale of *Doyle* and *Hale,* on facts not as strong as in the case at bar. The following judgments were vacated based on the certiorari petitions alone: *Rudolph v. Wisconsin,* 429 U.S. 1034 (1977), Docket No. 76-5146; *Middleton v. South Carolina,* 429 U.S. 807 (1977), Docket No. 75-6509; *Richman v. United States,* 427 U.S. 903 (1976), Docket No. 75-5958; *Meeks v. Havener,* 428 U.S. 908 (1976), Docket No. 75-5416; and *Lebowitz v. Florida,* 429 U.S. 808 (1976), Docket No. 75-1756.

CONCLUSION

The case at bar is procedurally identical to *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In both cases the accused appealed his conviction and had certiorari denied by the state supreme court. The case at bar falls squarely within the due process violation condemned by *Doyle.* The State intentionally and repeatedly elicited over objection the fact that the Accused remained silent after having his *Miranda* rights repeatedly read to him. As in *Doyle,* the decision below should be summarily reversed for a new trial. In the alternative, a writ of certiorari should issue and this cause heard upon a consideration of the entire record.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1978

FREDDY DUANE BLAKLEY,	)	
Appellant,	)	NOT FINAL UNTIL TIME
	)	EXPIRES TO FILE
v.	)	REHEARING PETITION
	)	AND, IF FILED,
STATE OF FLORIDA,	)	DISPOSED OF.
Appellee.	)	CASE NO. 77-2076

Decision filed July 19, 1978.

Appeal from the Circuit Court for Broward County; Humes T. Lasher, Judge.

J. David Bogenschutz of Varon, Stahl, Kay and Roderman, P.A., Hollywood, for appellant.

Robert L. Shevin, Attorney General, Tallahassee, and Harry M. Hipler, Assistant Attorney General, and Charles A. Stampelos, Assistant Attorney general, West Palm Beach, for appellee.

PER CURIAM,

AFFIRMED.

DAUKSCH, J., dissenting:

I respectfully dissent. This is a case quite similar to *Greenfield v. State*, 337 So. 2d 1021 (Fla. 2d DCA 1976) both in its facts and the law.

On direct examination in the State's case in chief the prosectutor elicited from a policeman the testimony that the defendant has been advised of his rights under *Miranda*[1] and that the defendant maintained his right not to give a statement. After the officer told the jury the defendant exercised his *Miranda* rights the attorney for the defendant objected and moved for a mistrial. In fact, throughout the questioning of the officer in regard to the *Miranda* warnings and the defendant's response, the defendant's attorney made objections and made a "continuing objection" at a point prior to the officer actually telling the jury the defendant refused to make a statement. The officer telling the jury that the defendant refused to give a statement after a *Miranda* warning is error. *Bennett v. State*, 316 So. 2d 41 (Fla. 1975). It is fundamental error, not requiring an objection. *Paulen v. State*, 352 So. 2d 1205 (Fla. 4th DCA 1977).

However, like in *Greenfield*, supra, there is a twist to this case. In essence the defendant's refusal was introduced for the purpose of showing the defendant was "sane" at the time of the commission of the crime because he evidently understood a *Miranda* warning at the time of his arrest, shortly after the crime occurred. The testimony was introduced *in anticipation of an insanity defense* because the defendant had given notice of his intention to claim insanity and had pleaded not guilty by reason of insanity.

While I agree with the dissent of Judge Grimes in *Greenfield*, supra, I also dissent here because of the order of

[1]*Miranda v. Arizona*, 384 US 436, 36 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

things. Let us assume the refusal of the accused to make a statement is admissible on the issue of insanity, as it was found to be in *Collins v. State*, 277 So. 2d 538 (Fla. 3rd DCA 1969). I see no reason to further compound the problem by allowing its admission before the defendant has made an issue of his insanity by presenting evidence about his insanity. In *Collins*, supra, the officers' testimony about the accused's statements after warning ("I guess I will have to get a lawyer") were admitted *in rebuttal* after the defendant had presented evidence about his insanity. Therefore, I say *if* we can get over the *Bennett*, supra, hurdle then we must also jump another one in regard to the "postural sequence."[2] The defendant had not yet presented any evidence of insanity and, at that point, no evidence of his sanity was relevant, ergo, the admission of the testimony was error. It was harmful because it violates *Bennett*, supra. It was fundamental as we said in *Paulen*, supra and *Sylvester v. State*, 341 So. 2d 203 (Fla. 4th DCA 1977). It cannot be deemed harmless. *Sylvester*, supra.

I would reverse and remand for a new trial.

[2]See footnote 4 in *Greenfield*, supra, which states:

> "No issue is made herein about the postural sequence in which the evidence came in. That is, the evidence came in during the state's case in chief before there was any evidence from the appellant as to his insanity. But no objection was made at the time. So, by objecting to prosecutorial comments thereon during summation, the appellant is in no different position than he would have been in had such evidence been introduced in rebuttal, when it would have been, as we hold here, proper".

APPENDIX B

IN THE DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FREDDY DUANE BLAKLEY,
Appellant,

v. CASE NO. 77-2076

STATE OF FLORIDA,
Appellee.

September 20, 1978

BY ORDER OF THE COURT:

ORDERED that the petition for rehearing filed August 3, 1978 is hereby denied.

A TRUE COPY:

/s/ Clyde L. Heath
CLERK

cc: J. David Bogenschutz, Attorney
Attorney General (15th)

cms
[Received Sep 21, 1978
Varon, Stahl]

APPENDIX C

SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 28, 1979

FREDDY DUANE BLAKLEY,
Petitioner,

vs.

STATE OF FLORIDA
Respondent.

District Court of
Appeal, Fourth District

DCA CASE NO. 77-2076

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9. 120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur
ADKINS, Acting Chief Justice, dissents

[Received Mar 5, 1979
/s/ mjf
VARON, STAHL

sg
cc: Honorable Clyde L. Heath, Clerk
Honorable Robert E. Lockwood, Clerk
Honorable Humes T. Lasher, Judge

Messrs. Varon & Stahl
Honorable Benedict P. Kuehne

APPENDIX D

[102] Q In your professional opinion what amount of pressure would it take to choke someone so they had difficulty breathing? A I don't know. I really can't tell what term the pressure is.

Q The measure of pressure? A I don't know how to answer this question.

Q So, all that matters is how much force was used; is that right? A That is true.

Q Is it possible that someone that was choked to the point that they had difficulty breathing would necessarily have to have scratches, cuts or bruises? A I don't think so.

MR. SPRINGER: Thank you, Doctor.

THE COURT: Mr. Taylor?

MR. TAYLOR: No further questions.

THE COURT: You may step down. Thank you.

(Thereupon a discussion was had off the record.)

THE COURT: Take the jury out.

(Thereupon the following proceedings were had in the absence of the jury.)

[103] MR. SPRINGER: The State would call Officer Biggs.

Thereupon the State of Florida, further to maintain the issues on its part to be maintained, called as a witness OFFICER RICHARD WILLIAM BIGGS, who, being first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. SPRINGER:

Q Identify yourself, please. A My name is Sergeant Richard William Biggs.

Q On February 6, 1976, did you come in contact with an individual by the name of Freddy Blakley? A Yes, I did.

Q Did you have an occasion to advise him of his rights? A Yes, I did.

Q Did you have occasion to observe whether or not he made any indication as to understanding those rights? A Yes.

Q Did you further have occasion to advise him of his rights more than one time? A Yes, on three different occasions.

Q Did you personally advise, two, three or how many times? A He was advised three times, two of the three [104] times by myself.

Q The second time would have been the first time you advised him; is that right? The first advising of rights was not by yourself; is that right? A No, sir.

Q The second advising would have been the time you advised him off a Miranda warning card? A Yes.

Q The third time that would have involved you advising his rights was using what is recorded as a rights waiver form? A Yes.

Q Did you follow a certain procedure in reading the rights to him, having him sign, initial that form? A Yes, I did.

Q As to the understanding of his rights? A Yes, sir, I did.

Q Were you present when Sergeant Kreulen, with the Wilton Manors Police Department, asked him, after the signing of his rights waiver form, if he wished to make a statement? Were you present when Sergeant Kreulen —

MR. LASWELL: Objection. He is assuming a fact not in evidence. We didn't know Kreulen, or anything.

MR. SPRINGER: This is on a proffer, Anyway.

[105] Q Were you present when Kreulen asked if he wished to make a statement? A Yes, I was.

Q Were you present when Mr. Blakley responded? A Yes, I was.

Q Do you recall what he said? A Yes.

Q What did he say?

MR. LASWELL: Objection. I think we are going to have to have a better foundation than this. In the first place we

put the Court on notice, as well as Mr. Springer. They have gone through quite a scene that they have furnished the Court, myself, Mr. Springer a report which raised the issue. The Court has accepted them — "Did you read him his rights? Did he understand —" and in effect it makes it almost unimportant, the issues that we are trying here.

THE COURT: As to the questions, responses and observations —

MR. SPRINGER: I agree with that. I will go into it in more detail whatever this understanding was.

Q Officer, how many occasions have you had to read a person their rights in your career as a police officer? A Better than hundreds of times, sir.

Q From a Miranda warning card and from the rights waiver form? [105] A Yes.

Q Hundreds of times for each, or both? A I would say more from the Mirand warning card than the rights waiver. In reference to the rights waiver, still hundreds of times.

Q Any of those hundreds of times, have you ever run across a person who, in your opinion, just didn't know what was going on? A Yes, sir.

Q They couldn't even intelligently respond to your questions? A Yes, sir.

Q Have you ever run across a person who is under the influence of alcohol or drugs and you attempted to read them their rights? Many times a person didn't know what was going on? A Yes.

Q They weren't able to sign any rights waiver form, yes or no? A Yes.

Q Have you ever had occasion to be involved in the picking up, if you will, of certain mental patients to take them to Coral Ridge Psychiatric Hospital for the purpose of the Baker Act? A Yes.

[107] Q How many times have you done that? A Numerous times.

Q Have you seen the behavior of these persons exhibited to you that you took over to the Coral Ridge Psychiatric Ward? A Yes, I have.

Q Without having you describe the behavior that they exhibited, the comparison wasn't the behavior that Mr. Blakley exhibited on this night? A Yes.

Q In your opinion, based on that opinion, that comparison and your observations, do you have an opinion as to whether or not he understood what was going on and understood the rights? A Yes.

MR. LASWELL: Objection for the record. I think those observations have to be here. I don't think you can jump from point A; Did you see the man — to point B, what did you think — for that reason I would ask the court to see that this record is made.

THE COURT: All right.

Q Describe Mr. Blakley's condition when you read him his rights. Describe his condition when you read him his rights the second time.

MR. LASWELL: When and where?

[108] Q When and where, the first time? A The first time it was in my office. I was a detective at the time, not a road Sergeant. It was in my office at the Wilton Manors Police Station, in Broward County.

The second time was also in my office within a minute or two after reading this to him from the Miranda card, the rights waiver. The rights waiver was read to him and given to him to read and signed also in my office at the police department.

Q Describe his condition on each of those occasions. A His condition was calm. It wasn't violent.

Q Did he appear to be intoxicated? A No, he did not.

Q Did he appear to be under the influence of any drugs? A No, he did not.

Q Did you make any promises or threats? A No, sir, I did not.

Q What was the surrounding of your office? A At my desk, approximately twelve by sixteen, three desks in it. Three detectives working out of one office.

Q Did you allow him to smoke? A Yes, sir.

Q Did you offer him water or coffee? A Yes.

[109] Q Is there anything else that you remember about his behavior? Was he handcuffed? A When he was in our office, no, he wasn't.

Q So, what is your opinion based on these things that he understood, his rights, as to what was going on? A My opinion as a police officer with nine years of experience is that the defendant understood his rights as were advised by myself, and he understood them. They were read to him twice by me, personally.

He read, understood the rights waiver, but he would not give us any statement.

MR. SPRINGER: That is the extent of the proffer, Judge.

I am attempting to elicit the one statement; that at the end of the reading of these rights, and secondly when Sergeant Kreulen asked: "Do you wish to give a statement?" He says, "Would you give one if you were me?"

MR. LASWELL: May I cross, Judge?

THE COURT: Voir dire examination.

VOIR DIRE EXAMINATION

BY MR. LASWELL:

Q Tell me about these Baker Act cases. How many times have you taken somebody to Coral Ridge? A Quite a few times.

[110] Q In your nine years of experience, are you able to characterize how these people in the Baker Act acted? A I could tell you how they acted in my opinion.

Q Well, I want your observations. Could you tell us how people that you take to Coral Ridge that have been Baker Act, what your observations were? A I can recall two basic observations, either extremely emotional, wanting to fight all the way, or the other extreme, calm, docile.

Q What did the calm, docile ones act like? A Like a child, like an infant.

Q Are they calm? A Very calm.

Q Very quiet? A Very quiet.

Q Not fighting? A No, sir.

Q Can you characterize them as to the appearance of the head and face? A Frightened.

Q How do they look? Have you ever seen a guy go like this? A Yes, I have.

Q Can you characterize the docile ones as having a disheveled, mused appearance, not neat and clean? [111] A Generally not neat, generally not clean, kind of reminds me of a person who can't take care of themselves.

Q How was Freddy's hair when you read him the rights waiver? A Really, I don't remember.

Q Did you book him? A I didn't do it.

Q Somebody did, though; right? A Yes.

Q Was his picture taken? A Yes, sir.

Q Would you have a copy of that picture, sir? A No, sir.

Q Tell me about his clothes. Was he neat and clean? A At the time of booking?

Q The time you read him his rights. A At the time he was in my office, and if my memory serves me correctly, his clothes were disheveled and messed up, and Sergeant Kreulen had to lend him some clothes.

Q Did he look like somebody who couldn't take care of himself? A No, sir.

Q But he looked disheveled? A Yes.

Q Not neat? [112] A Yes, sir.

Q He was acting docile, wasn't he? A No, sir, he wasn't acting docile.

Q You said he wasn't violent? A No, I said the two extremes I have witnessed for the Baker Act. I witnessed the extremes between the two most common.

Q What I am trying to find out is where this guy fits in the Baker Act? A Neither.

Q Does he fit in the category of other people that you arrested, other than the Baker Act? A Sure.

Q Sure he does? A (affirmative nod.) Yes, sir.

Q How many other arrests have you had? A I have been a police officer since 1968. I have been making arrests since then.

Q You are a good police officer? A Yes.

Q You made a lot of good arrests, but I am wondering on what basis you could come to the point you can put yourself in his mind. A I can't, sir.

Q And to testify in this court and Mr. Springer's [113] questions on what was going on in his mind.

MR. SPRINGER: We are not asking what is going on in the defendant's mind. We are asking what he observed. Ojection.

THE COURT: Objection sustained.

MR. LASWELL: I am going to ask the court to strike all of that testimony about what Freddy understood or didn't understand.

THE COURT: Overrule the objection.

MR. LASWELL: Thank you.

You are overruling my motion on another question, but not to the form of the question?

THE COURT: Overruled.

Q Another question: Do you understand the Miranda rights? A Yes, sir.

Q Do you think that most people that you read them to understand them totally? A I think if a police officer is doing his job and he explains the Miranda warning the way it should be explained, that most people would understand them, yes.

Q Did you explain the Miranda warning? A On two occasions.

Q You didn't just read them, then? A No, sir.

[114] Q What did you say with reference to the right to counsel? A That the defendant has a right to counsel.

Q Well, I understand that, if that is what it says in the waiver? A Yes.

Q In addition to reading from I think the second, third paragraph, tell me what you explained to him? A The

Miranda warning number 2: You have the right to talk to an attorney and have him here with you before we ask you any questions. Do you understand?

The reply: "Yes, I do."

Q But you said that you explained that to him. I think that is very clear, don't you? A Yes, it is clear.

Q What did you have to explain to him other than what is there? Why couldn't you just read that? Why did you have to explain it? A If a person doesn't understand it is explained. "You have a right to an attorney."

"What does that mean?"

I would go into detail explaining that right if it was asked of me.

Q How many people have you arrested who have discussed that with you? [115] A Very few.

Q What did you explain to Freddy? A Nothing.

Q You didn't explain it to him? A No, sir.

Q What is the next one? A "If you cannot afford to retain your own attorney, if you want an attorney one will be appointed for you before we ask you any questions. Do you understand?"

Q Of course he said, yes, and initialled it; right? A Yes.

Q Did you explain that to him? A No, sir.

Q You didn't have to explain either of those? A No, sir.

Q What did you explain to him? A I don't follow you.

Q You testified in response to another question a moment ago that a police officer explains those things.

Didn't you explain those to Freddy?

You said, "Yes."

You didn't just read the Miranda rights.

What did you explain to him? A If I can clarify that. I am not talking about this defendant, but just anybody that is being advised of [116] their rights, and if they don't understand one of the Miranda warnings, what I am saying is I will go into details to explain that particular warning under the rights of the defendant.

For example, if a defendant would say, "What do you

mean? You can get me an attorney? I don't have any money."

I will then go a further step and explain to obtain an attorney, what needs to be done.

In this particular instance I did not have to do it with this defendant.

Q How did you know that? A Because he never challenged, he never asked me. He said he understood and signed them.

Q How do you know he didn't understand; that he wanted to get out of there and go home? A Well, he knew he was going to jail.

Q How do you know that? A Because he was arrested for a felony crime.

Q Most people who are arrested want to get out of there and go home, don't they? A Yes.

Q How many guys have you arrested that wanted to go to jail? A Nobody.

Q My question is, approximately an hour before; [117] that he had told several witnesses in the parking lot, as the Swinging Door, he just wanted to go home.

How do you know that he didn't want to go home? A I don't know.

Q So, it could have been either way? A I don't follow you.

Q He might have understood, he might have said, "Okay. I will sign. Let me go home"; right?

You don't have any way of knowing? A Not in my opinion, no, sir.

MR. LASWELL: Nothing further.

THE COURT: Anything further?

MR. SPRINGER: No, Your Honor.

THE COURT: The Court will find that whatever statement was made was made voluntarily, intelligently and freely given.

MR. LASWELL: At this point I want to render an objection out of the presence of the jury. The very purpose for

Miranda was to eliminate the use of the statement against the defendant.

We have a case — I'm sorry I can't remember the case — we have here a situation of a police officer's interpretation after his rights were read, and the Court well knows the whole basis for those, to stop that.

THE COURT: Let the record note Mr. [118] Laswell's objection. The Court will overrule the objection and allow the proffer.

MR. SPRINGER: Judge, for the record, I want to cite one case in support of our position, Collins v. State, 227 So 2nd 538.

THE COURT: Bring the jury in.

(Thereupon the following proceedings were resumed in the presence of the jury.)

(Thereupon a conference was had at the bench between Court and counsel out of the hearing of the jury and off the record.)

DIRECT EXAMINATION

BY MR. SPRINGER:

Q Would you identify yourself, sir? A Sergeant Richarg Biggs. I am a police officer employed by the City of Wilton Manors, Broward County, Florida.

Q How long have you been a police officer, Officer Biggs? A Nine years.

Q Were you employed by the City of Wilton Manors on February 6, 1976? A Yes, I was.

Q In what capacity? A As a detective for that organization.

Q Did you have occasion on that day to come in [119]contact with an individual by the name of Freddy Duane Blakley? A Yes, I did.

Q Where did you first come in contact with that individual? A At the Swinging Door Lounge located on Wilton Drive, in the City of Wilton Manors, Broward County, Florida, in the parking lot of the said establishment.

Q About when was this, sir? A Approximately eight o'clock in the evening.

Q Do you have your report which would refresh your recollection as to the time? A Yes, sir.

Q Would you check those reports and see what the approximate time was? A It was 8:10 that evening.

Q That is when you arrived at the Swinging Door Lounge; is that right? A Yes.

Q What did you do? A I was first met by Patrolman Stephen Kenneth who is a patrol officer for our city.

Q Don't tell us anything that Kenneth said. That would be hearsay. Tell us what you did based upon what you were told, and so on. A I proceeded to an apartment which was on the [120] top of the Swinging Door Lounge, on Wilton Drive, and met with police officers and the complainant in this case.

Q Did you have some conversation with the complainant? A Yes.

Q Do you recall her name to be Mary Louise Eberhart? A Yes, that is her name.

Q What did you observe her condition to be? A She was in an emotional state, crying. Her clothes were disheveled, and she told what had happened, taken place.

Q Did she, in fact, tell you what had taken place? A Yes, she did.

Q What did you do next? A I requested from my partner, Detective Sergeant Kreulen to respond to the scene to help me with the investigation.

Q Then what happened? A I was waiting for Sergeant Kreulen to arrive. I talked a little bit further to the complainant, to find the particulars in the case, and was advised by her that the defendant in this case was downstairs in the parking lot at this time being watched.

Q Did you go down and locate the person that you believed to be the defendant? [121] A Yes, I did.

Q Did you have any opportunity to talk to that person? A Yes, sir.

Q What did you observe? How did he appear? A He appeared normal, standing there.

Q What was he doing, if anything? A He was standing by a vehicle with the police officers, standing along side of them.

Q Did you have occasion to speak with him? A Not at that time, no, sir.

Q Did you have an occasion to be close enough to smell odors, if there were any? A Yes, sir, I was close enough. I didn't smell any odors of anything.

Did you have occasion to see him walk? A Yes, sir,

Q How did he walk? A Normal.

Q How were his eyes? How did they appear? A Normal.

Q Even though you didn't have a conversation with him, did you have occasion to hear him speak? A Not at that time, no, sir.

Q What happened next? [122] The defendant was transported by the uniform patrol division back to the police department. Sergeant Kreulen and myself began processing the crime scene.

Q Now, back at the station, did you have an occasion at some time later to come in contact with Freddy Blakley again? A Yes, later that evening.

Q How did he appear at that point? Where was that? A That meeting took place in my office, in the detective bureau, at Wilton Manors Police Department.

Q Who was present at that meeting? A Myself, Sergeant Kreulen and the defendant, Mr. Blakley.

Q What time was this, if you recall? A Without referring to the detailed lengthy report, it was several hours later that evening. I am not sure of the exact time.

Q Do you recall when you were in the office with Sergeant Kreulen and Mr. Blakley? Was he in any type of restraints? Was he handcuffed? A No, sir.

Q You had a conversation with him at that point; is that correct? A Yes, sir.

Q What did you say to him? [123] A I advised the defendant who I was. I wasn't in uniform. I was in plain clothes, a detective, and advised him of his Miranda warnings.

Q How did you do that? A By reading off of a card which is located in wallet.

Q Did you read each and every one of those warnings to him? A Off of the card, I did.

Q What procedure did you follow? A I took the card out of the wallet. I sat him in a chair. I sat behind my chair, and began to read the Miranda warnings off this card.

Q He was seated? A He was sitting.

Q As to each of the rights, did you read all of them? A Yes.

Q How did you do that? A After I read each right I questioned him if he understood that particular right as I read it to him; and he indicated, yes, he did.

Q How long were you with him on that particular occasion, in your office, if you recall? A A couple of hours. I would say an hour and a [124] half to two hours.

Q You were with him an hour and a half on that occasion? A Yes.

Q What did you do during that period? A Well, a case of this magnitude, there is always an awful lot of booking procedures.

Q Paperwork, and so on? A Yes, sir.

Q Those reports, did you start to prepare those? A Yes, sir.

Q Did you complete those that evening? Did you again speak with Mr. Blakley? A Yes, shortly after advising him of his Miranda rights from the Miranda rights warning card which I have in my wallett.

I produced a waiver of those rights, and again I read him his rights and asked each time after reading the particular right if he understood.

Q Do you have the original? A Right here.

Q I would like to show you what has been marked as

State's Exhibit "H" for identification and ask if you can identify and tell us what that is? A Yes, sir, I can identify it. It is the waiver [125] of rights which was signed by the defendant and myself on the evening of February 7, 1976, at approximately 2:05 in the morning.

Q How did you know that that is the original waiver form, rights waiver form? A Because my original signature is on it.

Q What procedure did you use to have this filled out or the rights read to him from this?

Who filled in the top part with the name and the place and time? A Sergeant Kreulen.

Q Does this sheet contain each and every one of the Miranda rights? A Yes, sir.

Q How did the defendant indicate that he understood each of these rights? A As each right was read to him by myself, I asked the defendant if he understood that particular right.

He stated, yes. I asked if he would sign, yes, that which he did.

Q Do all those rights require a yes answer if they understand? A If they understand they will answer yes. If they don't understand the rights they will answer no to it.

Q Are there any rights on that form that a person [126] by acknowledging that he understands that rights would indicate something other than a yes? A Yes, there is.

Q Read that and tell us what it is.

MR. LASWELL: Objection. I think the exhibit speaks for itself.

THE COURT: Objection sustained.

MR. SPRINGER: I assume since it's not in evidence.

MR. LASWELL: It would be fundamental error to what is going on here. I would like to have a continuing objection noted on this entire line of questioning, and everything else.

THE COURT: Let the record note the objection of the introduction of this as an exhibit.

Q Other than referring to the exhibit, in reading those rights to him, would you read a right and hand it to him? Did you show it to him? A Before I handed it to him I first asked if he understood what I had just read to him. If he answered yes or answered no, I instructed: "Please put that on the sheet and initial it to either yes or no."

Q Did you ask him to read the rights in addition to having read it to him? A Yes, after I read it from the waiver form I [127] handed it to him to read and answer and to initial it.

Q Were his responses or indications all yes to each right? A No, sir, he responded no to one of his rights.

Q Which right was that? A The right if he would be willing to talk to us, the police officers, in reference to this case. In reference to what he was there for.

Q Did he sign it in your presence? A Yes, he did.

Q How many times have you, in your career as a police officer, read individuals their rights? A Hundreds of times, sir.

Q How many times have you read and advised individuals of their rights from a rights waiver form as opposed to a Miranda warning card! A Also hundreds of times.

Q Have there been any occasions upon reading these rights from either the rights card or the rights waiver form that persons just did not respond to your questions, as to understanding? A Yes, sir.

Q They did not indicate with a signature and initial? A Yes.

[128] Q Have you ever attempted to read rights to persons that in your opinion were under the influence of alcohol? A Yes, sir.

MR. TAYLOR: Objection to that. That is irrelevant, immaterial to the matter at hand.

MR. LASWELL: It's not what the officer has done in the past, but what he has done in this particular case.

MR. SPRINGER: It goes to the voluntariness, and the jury has a right to hear the voluntariness.

THE COURT: Let us approach the bench a minute.

(Thereupon there was a conference at the bench between the Court and counsel out of the hearing of the jury and off the record.)

BY MR. SPRINGER:

Q You have, have you not, on occasion, read individuals who, in your opinion were under the influence of alcohol; is that correct? A Yes, sir.

Q Who, in your opinion were under the influence of drugs or intoxicated? A Yes, sir.

Q You observed the behavior of these people? [129] - A Yes, sir.

Q Based upon your observations of this individual that night — First of all, tell us how you observed this individual to be when you read these rights? How did he appear? What did he do? A He appeared very calm, collected. He did not give the police officers a hard time. He would not talk to us, but he didn't give us a hard time, either.

Q Did he ask for any explanations of any rights? A No, sir.

Q Did you make any promises to him, or threaten him in any way to sign the rights waiver form? A No, sir.

Q Have you ever had occasion in your career as a police officer to pick up persons and take them to the psychiatric ward of Coral Ridge Hospital? A Yes, sir.

Q On how many occasions? A Numerous.

Q On those occasions did you observe the behavior of those people? A Yes, sir.

Q In observing the behavior of Mr. Blakley on this night, what would your opinion be as to his state as compared to those persons? [130] A No comparison.

Q What do you mean by that? A Like I testified, Mr. Blakley was fine.

MR. LASWELL: Objection; this being a conclusion. It is a characterization without foundation.

THE COURT: Objection sustained as to the form of the question.

Q You stated that he appeared to be calm. He didn't ask

questions of you? He indicated that he understood these rights; is that correct? A Yes, sir, he did.

Q Based upon the observations of him that night, and comparing those with the persons that you have taken to the psychiatric ward of Coral Ridge Hospital, did you come to an opinion as the mental condition or understanding of Mr. Blakley on that night? A Yes, sir.

Q What is that opinion? A That he wasn't going to Coral Ridge.

Q What do you mean by that? A He wasn't crazy. He wasn't mentally disturbed.

Q Did he appear to be intoxicated? A No, he did not.

MR. SPRINGER: At this time I move defendant's exhibit "H" into evidence.

[131] THE COURT: Do you wish to voir dire, Mr. Laswell?

MR. LASWELL: Judge, I will rely on the record as it now exists, and repeat my objection on the same ground.

THE COURT: It will be entered as a State's Exhibit.

(Thereupon State's Exhibit No. 5 was marked and received into evidence.)

MR. SPRINGER: That is all the questions I have of this witness.

THE COURT: Mr. Taylor.

CROSS EXAMINATION

BY MR. TAYLOR:

Q Officer, approximately what time did you arrest Mr. Blakley? A Sir?

Q Approximately what time that night did you arrest Mr. Blakley? A I didn't arrest Mr. Blakley.

Q What time was he arrested or taken into custody? A Approximatley a few minutes after the hour that the police officers originally arrived at the scene.

Q Do you have anything on your records that you brought with you to indicate that? [132] A Yes, sir.

Q Could you check those records and tell us, Please? A Yes, sir. 9:26 P.M.

Q Approximately what time were you sitting with Mr. Blakley at the police station? A Into the early hours of the following morning.

Q Sometime around 2:00 o'clock in the morning? A Yes.

Q A little later than that? A Probably, yes.

Q What was the purpose of delaying taking Mr. Blakley into your office between the hours of eight and sometime after 2:00 o'clock in the morning, a period of five hours? A Many reasons.

Q Such as? A Taking the complainant to the hospital, getting emergency first aid treatment by a doctor.

Q What else? A Taking statements from the complainant, the witnesses, processing the crime scene, collecting and preserving evidence.

Q During this time where was Mr. Blakley placed? A He was placed in a jail cell at the Wilton Manors Police Department.

Q For approximately ten hours before you took him [133] out of the cell you took him into your office? A No, sir.

Q During those hours you mentioned, he was being processed and booked by the uniform road division? A The booking process on a felony case is quite lengthy.

Q What is the reason for that? A Because the municipality did not prosecute any felony cases. It is all done by the county, and the county requires certain paperwork —

Q Is it also your practice of processing to keep defendants in custody as long as possible, giving him his Miranda warnings in that office? A No, sir. He was given his Miranda warnings at the crime scene by another police officer.

Q Then he was given them again five hours later? A When he met with me, to talk with me, yes, sir.

Q That is the customary proceeding of a police

station? A I think you will find it the customary proceeding in most police divisions.

Q Do you have a copy of the first Miranda warning you gave to him, that you gave to the defendant? A Yes, sir.

Q Do you have it with you? [134] A Yes.

Q Is this the one in your wallet? A Sure.

Q So, this is what you gave to him orally. What exactly did you say to the defendant when you read these rights off of the card? A Just prior to reading the rights to him, at the time I was a detective, in plain clothes. I advised the defendant that I was a police officer; I was employed by the City of Wilton Manors; and that he was under arrest for this act; that before I spoke to him about this, I wanted to advise him of his rights under Miranda.

At which time I produced the card. I produced it and read those rights to him.

Q Did you explain his rights to him? A No, sir, I didn't explain.

Q Did you read them? A Yes, I read them.

Q Where was the defendant at the time you read these rights to him? A Sitting at the chair or side of my desk.

Q This was the first time? A Yes, sir.

Q Approximatley what time was this? A I would have to refer to the Miranda — because [135] it was a few minutes before the waiver was done.

Q Wait a minute. you said that his rights were given to him twice. A Twice by me.

Q Was it given to him by anyone else? A Yes.

Q How did you know that? A At the crime scene.

Q Were you there? Who came there? A Officer Stephen Kenneth.

Q Did he also read it to him from a Miranda card? A Yes, sir.

Q Were they explained to him? A By Officer Kenneth, no, sir.

Q All he did was read them? A Yes, sir.

Q During the time that you have been with the Wilton

Manors Police force have you ever experienced a defendant that would just sign a Miranda warning in the hope that they would be [136] be released after signing it? A No, sir.

Q Never? A No.

Q So, have you ever happened to be there when they just wouldn't go along with the program? A I have had people who have refused to sign them.

Q Have you ever had anyone who signed a rights waiver that you felt in your own mind may not have understood what he was signing? A No, sir, because if I had any one of those, I can't recall them.

Q What would that indicate to you, that someone might not understand what he was signing? A If he didn't understand the English language.

Q That is right. Obviously that is the criteria, obviously not in every every case, to understand the English language? A No, sir, that is not the criteria.

Q What do you do if they don't understand? A If they don't understand the reading, I explain it to them.

Q What about Mr. Blakley's case? He understood English; is that right? A Yes, sir.

Q Therefore, you assumed he understood the Miranda [137] warnings that you were giving him? A Yes, sir.

MR. TAYLOR: No further questions.

REDIRECT EXAMINATION

BY MR. SPRINGER:

Q You read him the rights. You didn't explain them; is that your testimony? A Yes, sir.

Q Was it necessary for you to explain them? Did you ask if he understood? A I asked if he understood. He said that he did.

Q What if he didn't? What if he said, "No, I don't"? A I would explain to the individual the rights that I was asking about.

Q Did you have to explain any of those rights? A No, I did not.

Q This Officer Richard Biggs, that read him his rights on the scene, do you know where he is today?

MR. LASWELL: For the record, that is Officer Biggs. you meant Stephen Kenneth.

Q Do you know where he is today? A He is on vacation.

MR. SPRINGER: Thank you.

[138] THE COURT: Anything further?

MR. TAYLOR: Nothing further.

THE COURT: You may step down.

Ladies and gentlemen, we are going to take a fifteen minute recess.

(Thereupon the Court took a short recess.)

THE COURT: Ready to proceed?

MR. LASWELL: The defendant requests a mistrial at this time for alleging for the reason that it is fundamental error in allowing former detective, now Sergeant Biggs, to testify about the Miranda waiver that it denies the defendant his right guaranteed by the Constitutional rules.

THE COURT: Mr. Springer.

MR. SPRINGER: In a very brief reference, the testimony of the officer was not for the purpose of showing admission of guilt. From the reading of his Miranda rights it went to the issues of his mental state and his condition, as far as understanding his rights.

MR. LASWELL: Having elicited that information, that is error.

MR. SPRINGER: My recollection of the testimony was that he said that he refused to give a statement, but rather when asked if he would give a statement he responded, "Would you give one if you were me?"

THE COURT: Overrule the motion to a [139] mistrial.

Bring the jury in.

(Thereupon the following proceedings were had in the presence of the jury.)

THE COURT: Be seated, please.

Does counsel concede the presence of the jury and defendant and waive polling? MR. LASWELL: The defendant does.

MR. SPRINGER: The State does.

THE COURT: Call your next witness.

MR. SPRINGER: The State would call Sergeant Kreulen.

Thereupon the State of Florida, further to maintain the issues on its part to be maintained, called as a witness KEN KREULEN, who, being first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. SPRINGER:

Q State your name for the record. A Detective Sergeant Kreulen.

Q By whom are you employed? A City of Wilton Manors, Broward County, Florida.

Q How long have you worked for the City of Wilton Manors? [140] A Since September 8, 1967.

Q Do you work for the Wilton Manors police? A Police Department, yes, sir.

Q How long have you been a police officer? A It will be going on ten years in September.

Q Have you had occasion during your experience as a police officer to come in contact with an individual by the name of Freddy Blakley? A Yes.

Q That would have been on February 6, 1976? A Yes, sir.

Q Did you have occasion to be present when Mr. Blakley was read his Miranda warnings? A Yes, sir.

Would you describe for the ladies and gentlemen of the jury how he appeared physically to you at that time? A He appeared coherent, and in possesson of all of his faculties. Hed was calm. He sat in my office with my partner who at this time is now Sergeant Biggs.

We talked to him, and he, Sergeant Biggs, advised him of his rights.

Q Did he make any indication in your presence as to understanding or lack of understanding of those rights?

MR. LASWELL: May I enter a continuing objection just to preserve the record, if that is acceptable [141] to the Court?

THE COURT: All right. Let the record note the objection. The Court will let the Officer testify as to what his observations were.

Q Did you observe whether or not he understood the rights that were read to him in his presence? A Yes, on both cases he indicated that he did fully understand his rights at that time?

Q There was a second occasion when he was read his rights from a so-called waiver form? A That is correct.

Q Did he make written indications as to understanding what was on the rights waiver form in your presence? A Yes, he did.

Q Did he sign that rights waiver form in your presence? A Yes, sir, he signed the bottom line.

Q Also, during your experience as a police officer, have you come in contact with individuals that appeared to be under the influence of alcohol, in arrest situations? A In an arrest situation, under he influence of alcohol.

[142] Q Would you arrest somebody in your professional opinion, based on your experience, if they seemed to be under the influence of alcoholic beverages? A Yes, sir, several times.

Q What do you mean by several times? A At least ten times in the ten years.

Q Have you come into contact with a person that you arrested or intended to arrest that appeared to be under the influence of any type of drugs or narcotics? A Yes, sir.

Q Also, many times? A Yes, sir. For the six months I worked narcotics.

Q Further, have you ever had contact with individuals that you had occasion to take to the psychiatric ward of Coral Ridge Hospital for the purpose of the Baker Act? A Yes, sir.

Q How many times was that? A. As a patrol officer I would say at least twenty times. As a detective, assisting patrol, probably ten, fifteen times.

Q These people that you have taken to Coral Ridge Psychiatric Hospital, how did they appear? What would their behavior be like?

MR. LASWELL: Objection. This is immaterial.

[143] MR. SPRINGER: I will withdraw the question.

Q Based on your observations of Mr. Blakley on this evening in question and your contact, personal observations, and based on the comparison, observations of the persons that you have seen under the influence of alcohol, drugs or the ones that required you to take to the psychiatric hospital, Coral Ridge Hospital, have you been able to form an opinion, a lay opinion as to the mental condition of Mr. Blakley on the night of February 6, 1976? A Yes, it is my opinion that due to his cooperation and his main behavior, he was in control of all of his faculties, and there appeared to be no problem, mentally or physically with the gentleman.

Q On the night, on the two occasions he was read his rights when you were present, did you have occason to ask him if he wished to make a statement? A Yes, I did.

Q What was his sigular answer?

MR. LASWELL: Objection.

THE COURT: Objection sustained. Go ahead.

MR. SPRINGER: I have no further questions.

THE COURT: Mr. Taylor.

[144] CROSS EXAMINATION

BY MR. TAYLOR:

Q Officer, did you have occasion to bring Mr. Blakley to booking, take a picture of Mr. Blakley? A Booking?

Q Yes. A No, sir.

Q Did you take the picture when he was booked? A. I believe the patrol division did.

Q Is that a general, standard practice? A Yes. In keeping

his files, his arrest record, it would be attached to his complaint card or attached to his print card.

Q Did you not bring that with you today? A No, sir.

Q Did there come a time when you took a statement that night? A Yes, sir.

Q Did you personally take those statements? A Yes, sir.

Q Did you personally produce what is called a photographic lineup? A Yes, sir.

Q Approximately how many pictures were there? A Approximately seven.

[145] Q One of these was the defendant, Mr. Blakley? A Yes.

Q Do you have copies of those pictures with you? A I believe counsel has the pictures.

Q Referring to the State attorney? A Yes.

MR. TAYLOR: Thank you. No further questions.

REDIRECT EXAMINATION

BY MR. SPRINGER:

Q When you showed the pictures to the witnesses that night, were there any identifications made in your presence? A Yes, but they were not all on that night.

Q When those pictures were shown, was an identification made? A Yes, sir.

Q Was the identification of one individual? A Yes, sir.

Q What individual was that? A Mr. Blakley.

Q Is Mr. Blakley here in the courtroom? A Yes, sir.

MR. SPRINGER: No further questions.

MR. TAYLOR: We move for the production of the pictures right now.

[146] MR. SPRINGER: No problem. They are in another file in my office. I will bring them.

THE COURT: Do you want a recess, or do you want to go on?

MR. LASWELL: No further cross.

THE COURT: You may step down. Thank you.

MR. SPRINGER: Just a point of inquiry. The State is not

intending to introduce the photographs. We will provide them to the defense if they care to use it.

THE COURT: Approach the bench.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Petition for Writ of Certiorari to the Supreme Court of Florida," together with the attached copies of orders and related Appendix, was served by mail this _____ day of May, 1979, to Benedict P. Kuehne, Esquire, Assistant Attorney General of Florida, Department of Legal Affairs, 111 Georgia Avenue, West Palm Beach, Florida, 33401.

MICHAEL E. GELTNER, ESQUIRE

Cm

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-1749

FREDDY DUANE BLAKLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-1749

FREDDY DUANE BLAKLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PRELIMINARY STATEMENT

Petitioner, Freddy Duane Blakley, was the Petitioner and Appellant in the respective lower courts, the Florida Supreme Court and the Florida Fourth District Court of Appeal. Respondent,

the State of Florida, was the Respondent and Appellee in those courts. The parties are referred in this brief as they appear before this Court.

OPINIONS BELOW

The Order of the Supreme Court of Florida denying Petitioner's Petition for Writ of Certiorari in Case No. 55,252 is cited at 368 So. 2d 1362. The decision of the Fourth District Court of Appeal affirming Petitioner's conviction is reported at 362 So. 2d 309.

JURISDICTION

Respondent agrees with Petitioner's contention that this Court is authorized under 28 U.S.C. 1257(3) to review by certiorari decisions of state courts.

QUESTION PRESENTED

Whether the Prosecution in a criminal trial in the State of Florida is permitted to elicit testimony regarding an accused's silence in the face of custodial interrogation where such testimony is for the sole purpose of establishing the sanity of the accused in the face of a claim of insanity? (Restated)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself...

The Fourteenth Amendment to the United States Constitution provides, in applicable part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Respondent accepts much of the objective recitation of the factual matters contained in Petitioner's Statement of the Case. Respondent notes the following additions:

Mary Eberhart, 19, the victim of the sexual battery perpetrated by Petitioner, left the Swinging Door Lounge sometime before 8:00 p.m. on February 6, 1976. A man asked her if she wanted any help, and Eberhart responded in the negative. The man then bumped her into the vehicle, choked her, ripped her blouse open, and proceeded to penetrate the victim against her will.

Sergeant Richard Biggs met Petitioner Blakley at the Swinging Door Lounge shortly after the sexual battery occurred. The victim was hysterical. At the police

station, Petitioner was advised of his Miranda rights and indicated that he understood them.

Prior to the trial of this case, the accused filed a pre-trial notice of intent to rely upon the defense of insanity. In an effort to counter Petitioner's assertion of insanity, the Prosecution elicited the following from Officer Richard Biggs:

> Q. You had a conversation with him at that point; is that correct?
> A. Yes, sir.
> Q. What did you say to him?
> A. I advised the defendant who I was. I wasn't in uniform. I was in plain clothes, a detective, and advised him of his Miranda warnings.
> Q. How did you do that?
> A. By reading off of a card which is located in wallet.
> Q. Did you read each and every one of those warnings to him?
> A. Off of the card,I did.
> Q. What procedure did you follow?
> A. I took the card out of the wallet. I sat him in a chair. I sat behind my chair, and began to read the Miranda warnings off this card.

Q. He was seated?
A. He was sitting.
Q. As to each of the rights, did you read all of them?
A. Yes.
Q. How did you do that?
A. After I read each right I questioned him if he understood that particular right as I read it to him; and he indicated, yes, he did.
Q. How long were you with him on that particular occasion, in your office, if you recall?
A. A couple of hours. I would say an hour and a half to two hours.
Q. You were with him an hour and a half on that occasion?
A. Yes.
Q. What did you do during that period?
A. Well, a case of this magnitude, there is always an awful lot of booking procedures.
Q. Paperwork, and so on?
A. Yes, sir.
Q. Those reports, did you start to prepare those?
A. Yes, sir.
Q. Did you complete those that evening? Did you again speak with Mr. Blakley?
A. Yes, shortly after advising him of his Miranda rights from the Miranda rights warning card which I have in my wallet.

I produced a waiver of those rights, and again I read him his rights and asked each time after

reading the particular right if he understood.
Q. Do you have the original?
A. Right here.
Q. I would like to show you what has been marked as State's Exhibit "H" for identification and ask if you can identify and tell us what that is?
A. Yes, sir, I can identify it. It is the waiver of rights which was signed by the defendant and myself on the evening of February 7, 1976, at approximately 2:05 in the morning.
Q. How did you know that that is the original waiver form, rights waiver form?
A. Because my original signature is on it.
Q. What procedure did you use to have this filled out or the rights read to him from this?

Who filled in the top part with the name and the place and time?
A. Sergeant Kreulen.
Q. Does this sheet contain each and every one of the Miranda rights?
A. Yes, sir.
Q. How did the defendant indicate that he understood each of these rights?
A. As each right was read to him by myself, I asked the defendant if he understood that particular right.

He stated, yes. I asked if he would sign, yes, that which he did.

Q. Do all those rights require a yes answer if they understand?
A. If they understand, they will answer yes. If they don't understand the rights, they will answer no to it.
Q. Are there any rights on that form that a person, by acknowledging that he understands that right, would indicate something other than a yes?
A. Yes, there is.
Q. Read that and tell us what is is.
MR. LASWELL[defense counsel]: Objection. I think the exhibit speaks for itself.
THE COURT: Objection sustained.
MR. SPRINGER: I assume since it's not in evidence.
MR. LASWELL: It would be fundamental error to what is going on here. I would like to have a continuing objection noted on this entire line of questioning, and everything else.
THE COURT: Let the record note the objection of the introduction of this as an exhibit.
Q. Other than referring to the exhibit, in reading those rights to him, would you read a right and hand it to him? Did you show it to him?
A. Before I handed it to him, I first asked if he understood what I had just read to him. If he answered yes or answered no, I instructed: "Please put that on the sheet and initial it to either yes or no."

Q. Did you ask him to read the rights in addition to having read it to him?
A. Yes, after I read it from the waiver form, I handed it to him to read and answer and to initial it.
Q. Were his responses or indications all yes to each right?
A. No, sir, he responded no to one of his rights.
Q. Which right was that?
A. The right if he would be willing to talk to us, the police officers, in reference to this case. In reference to what he was there for.
Q. Did he sign it in your presence?
A. Yes, he did.
Q. How many times have you, in your career as a police officer, read individuals their rights?
A. Hundreds of times, sir.
Q. How many times have you read and advised individuals of their rights from a rights waiver form as opposed to a Miranda warning card?
A. Also hundreds of times.
Q. Have there been any occasions upon reading these rights from either the rights card or the rights waiver form that persons just did not respond to your questions, as to understanding?
A. Yes, sir.
Q. They did not indicate with a signature and initial?
A. Yes.

On cross-examination, defense counsel asked these questions about Miranda warnings:

Q. Is it also your practice of processing to keep defendants in custody as long as possible, giving him his Miranda warnings in that office?
A. No, sir. He was given his Miranda warnings at the crime scene by another police officer.
Q. Then he was given them again five hours later?
A. When he met with me, to talk with me, yes, sir.
Q. That is the customary proceeding of a police station?
A. I think you will find it the customary proceeding in most police divisions.
Q. Do you have a copy of the first Miranda warning you gave to him, that you gave to the defendant?
A. Yes, sir.
Q. Do you have it with you?
A. Yes.
Q. Is this the one in your wallet?
A. Sure.
Q. So, this is what you gave to him orally.
What exactly did you say to the defendant when you read these rights off of the card?
A. Just prior to reading the rights to him, at the time I was a detective, in plain clothes. I advised the defendant that I was a police officer; I was employed

by the City of Wilton Manors; and that he was under arrest for this act; that before I spoke to him about this, I wanted to advise him of his rights under Miranda.
At which time, I produced the card. I produced it and read those rights to him.
Q. Did you explain his rights to him?
A. No, sir, I didn't explain.
Q. Did you read them?
A. Yes, I read them.
Q. Where was the defendant at the time you read these rights to him?
A. Sitting at the chair or side of my desk.
Q. This was the first time?
A. Yes, sir.
Q. Approximately what time was this?
A. I would have to refer to the Miranda -- because it was a few minutes before the waiver was done.
Q. Wait a minute. You said that his rights were given to him twice.
A. Twice by me.
Q. Was it given to him by anyone else?
A. Yes.
Q. How did you know that?
A. At the crime scene.
Q. Were you there? Who came there?
A. Officer Stephen Kenneth.

Q. Did he also read it to him from a Miranda card?
A. Yes, sir.
Q. Were they explained to him?
A. By Officer Kenneth, no, sir.
Q. All he did was read them?
A. Yes, sir.
Q. During the time you have been with the Wilton Manors Police Department, have you ever had occasion to see a defendant who signed anything that he thought what he signed would assist in his release?
A. I don't understand what you are asking. Would you repeat it?
Q. During your experience in the Wilton Manors Police force, have you ever experienced a defendant that would just sign a Miranda warning in the hope that they would be released after signing it?
A. No, sir.
Q. Never?
A. No.
Q. So, have you ever happened to be there when they just wouldn't go along with the program?
A. I have had people who have refused to sign them.
Q. Have you ever had anyone who signed a rights waiver that you felt in your own mind may not have understood what he was signing?
A. No, sir, because if I had any one of those, I can't recall them.

Q. What would that indicate to you, that someone might not understand what he was signing?
A. If he didn't understand the English language.
Q. That is right. Obviously, that is the criteria, obviously not in every case, to understand the English language?
A. No, sir, that is not the criteria.
Q. What do you do if they don't understand?
A. If they don't understand the reading, I explain it to them.
Q. What about Mr. Blakley's case? He understood English; is that right?
A. Yes, sir.
Q. Therefore, you assumed he understood the Miranda warnings that you were giving him?
A. Yes, sir.
MR. TAYLOR: No further questions.

No motion for mistrial was made by the defense counsel until the conclusion of the testimony of Richard Biggs.

During closing arguments to the jury, defense counsel requested that a verdict of not guilty by reason of insanity

be returned (Resp. App. A)[1]. The jury was instructed on insanity during the court's charge.

ARGUMENT

Petitioner argues that the Fifth Amendment privilege against self-incrimination, as applied to the States through the Fourteenth Amendment, prevents the prosecuting authority in a criminal trial to comment on an accused's silence at the time of arrest, even when such comment is for the sole purpose of demonstrating sanity in response to a claim of insanity. Petitioner specifically argues that the decisions of the Florida courts in this case conflict with the rules of law pronounced in Doyle v. Ohio, 426 U.S. 610 (1976); United States

[1] "Resp. App. A" refers to Appendix A of Respondent's Brief in Opposition to Petition for Writ of Certiorari.

v. Hale, 422 U.S. 171 (1975); and Miranda v. Arizona, 384 U.S. 436 (1966). Respondent submits, however, that this case is precisely within the rule of those decisions and represents the logical delimitation of that rule of law.

Although the issue presented in this case and reviewed in the lower courts is a question that should be ultimately decided by this Court, the instant case is not the procedurally appropriate vehicle for such an examination. Although Petitioner did raise the Miranda-related issue in his Florida court appeals, the resolution of that question did not necessarily depend upon an evaluation of the constitutional claim. Rather, as argued to the Florida courts and as is evident in the appellate record, Petitioner did not correctly raise and preserve the question for full

appellate review.

Florida law is quite explicit that, in order to review the propriety of any comment on an accused's exercise of the right to remain silent in the face of custodial interrogation, an immediate objection and motion for mistrial must be tendered to the Court, and a request for a curative instruction should be made. Clark v. State, 363 So. 2d 331 (Fla. 1978); State v. Woodson, 330 So. 2d 152 (Fla. 4th DCA 1976). The reason for this procedural rule is quite simple and is founded on practical necessity and basic fairness in the operation of a judicial system: it places the trial judge on notice that error may have been committed and provides him with an opportunity to correct it at an early stage of the proceedings. By failing to immediately

object and request a mistrial, the accused will not be allowed to later claim that his rights have been violated. Castor v. State, 365 So. 2d 701 (Fla. 1978); Clark v. State, supra.

Federal law is no different, and requires counsel to promptly raise specific objections and otherwise advise the court on preferred courses of action to allow any error or mistake to be corrected. E.g., Estelle v. Williams, 425 U.S. 501 (1976). And, of course, this Court has previously acknowledged that the failure to follow a state procedural rule ordinarily precludes federal review. Wainwright v. Sykes, 433 U.S. 72 (1977).

In the present case, no defense motion for mistrial was made until the conclusion of the testimony from Richard Biggs. Under Florida law, such an untimely request comes far too late to

preserve the issue, particularly in light of defense counsel's examination of the witness along the same lines as that now raised as error. Because the question was not correctly preserved, this Court should decline to review its merits.

Nevertheless, on the substance of the Fifth Amendment claim, Respondent submits that a comment on an accused's exercise of his right to remain silent is permissible in order to demonstrate that the accused was sane at the time of the criminal offense. In the instant case, Petitioner raised an insanity defense. He filed a pre-trial notice of intent to rely upon the defense of insanity. The defense cross-examined State witnesses as to Petitioner's mental state. The jury was asked by defense counsel to return a verdict

of not guilty by reason of insanity. Finally, the jury was instructed on insanity. Thus, for all practical purposes, Blakley admitted the commission of the criminal event but denied that he was responsible for his actions.

The avowed purpose of the Miranda rule is to protect the accused from testifying against himself. Logically, if an accused admits the crime, he has already testified against himself. Thus, no error of constitutional proportion occurred when it was revealed that Blakley exercised his Miranda rights.

This is precisely the situation not only left open in Doyle v. Ohio, supra, but inferentially acknowledged as proper. This Court will remember that the Doyle holding was merely that "the use for impeachment purposes of petitioner's silence, at the time

of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. Thus, since Petitioner's silence in this case was not used for impeachment but to demonstrate his sanity, its use does not run afoul of the Constitution.

The same result is reached when the decision in United States v. Hale, supra, is considered. There, this Court ruled that in most circumstances, since silence is so ambiguous as to be of little probative force, a comment upon an accused's silence carries with it intolerable prejudicial impact. The present case, however, is not the ordinary one. Rather, Petitioner's silence had probative value. By cogently exercising Miranda rights, in light of an insanity defense, Petitioner demonstrated an ability to compre-

hend his situation correctly and to appropriately orient his behavior. Both facets go to prove excellent insight and judgment which would negate an insanity defense under Florida's M'Naughten Rule.

Under the particular circumstances of this case, the State's introduction of Petitioner's silence was relevant and probative of an issue at trial. While the procedure utilized here is certainly within constitutional guidelines, this Court, in its discretion, may find it appropriate to expressly approve of the practice.

Finally, Respondent maintains that the question raised by Petitioner is not controlling on the ultimate issue of Petitioner's guilt of the crime charged. At no time in the state proceedings did Petitioner challenge the sufficiency of the evidence against him. Respondent

argued to the Florida courts that evidence of guilt was overwhelming, rendering any alleged error harmless beyond a reasonable doubt. Thus, this case is further consistent with Doyle v. Ohio, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CLOSING ARGUMENT

ON BEHALF OF THE DEFENDANT:

MR. LASWELL: Thank you, Judge, Mr. Springer. It's been a long three days here. I appreciate very much the attention that you have paid and the consideration that you have given us here.

I am going to ask you in a few moments to return a verdict of not guilty by reason of insanity. I am going to give you a reasonable basis for doing it.

The burden of proof is on the State of Florida. So, this is the only time you are going to hear from me before going to the jury room, with Mr. Springer's closing statements and the Judge's instructions.

What really was sort of on trial, I think, I feel is the intelligence of our community. I am not going to try and bamboozle you or jump up and down. This case doesn't fit into that category.

I am not going to deny one thing that Mr. Springer said. . . .
(T 407)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I furnished three (3) copies of the foregoing brief to counsel for Petitioner, MICHAEL E. GELTNER, ESQUIRE, Georgetown Appellate Litigation Clinic, Room 430, Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, and to TIMOTHY J. HMIELEWSKI, ESQUIRE, 8 South New River Drive East, Fort Lauderdale, Florida 33301, this_____ day of July, 1979.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1749

FREDDY DUANE BLAKLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

In its opposition brief, the State of Florida argued that the Petitioner failed to properly preserve the due process violation of the prosecutor's use of the Petitioner's silence in the face of repeated *Miranda* warnings, even though Petitioner objected contemporaneously four times, and moved for a mistrial in between objections. This Reply

will focus on how the federal question raised in this Petition was properly preserved for review by this Court.[1]

The federal question dealing with the due process violations of the State's use of the Petitioner's silence in the face of *Miranda* warnings was properly preserved for this Court's review. The State relies on a narrow reading out of context of portions of Justice Alderman's opinion in *Clark v. State,* 363 So.2d 331 (Fla. 1978). The State argues that in order to procedurally preserve a substantial Fifth Amendment claim, the defendant must

[1] The remaining arguments made by the State in its Opposition Brief fall of their own weight:

By giving a notice of intent to rely on an insanity defense, the Petitioner in no way relieved the State of its burden of proving every element of the offense beyond a reasonable doubt. Under Florida law, there is no such thing as a plea of not guilty by reason of insanity. *Everett* v. *State,* 97 So.2d 241 (Fla. 1957), *cert. denied,* 353 U.S. 941 (1957). See Florida Rule of Criminal Procedure 3.170(a). The Defendant entered a plea of not guilty at his arraignment. Rule 3.170(a) of the Florida Rules of Criminal Procedure states that "A plea of not guilty is a denial of every material allegation in the indictment or information upon which the defendants is to be tried." Florida requires the giving of notice of intent to rely on an insanity defense in order to allow the State to obtain discovery from the defendant's expert witnesses. By giving notice, the defendant preserves the right to present such a defense, although he may abandon it at any time, even before its presentation. A defendant giving notice of intent to rely on an insanity defense is never required to incriminate himself in order to raise such a defense, the State always having the burden of proving every element of the offense beyond a reasonable doubt. *Parking* v. *State,* 238 So.2d 817, 820 (Fla. 1970). The prosecutor himself recognized this burden in his closing argument to the jury. Tr. 397.

The State's argument that the Fifth Amendment violations were admissible since they were not used for impeachment purposes is, of course, frivolous. See *Boyer v. Patton,* 579 F.2d 284, 288 (3d Cir. 1978), and page 16 of the original Petition for Certiorari in the case at bar.

simultaneously both object and move for a mistrial, regardless of the trial court's ruling on the objection itself. The State relies in addition on *Estelle v. Williams,* 425 U.S. 501 (1976); *Wainwright v. Sykes,* 433 U.S. 72 (1977); and *Castor v. State,* 365 So.2d 701 (Fla. 1978). The State also cites *State v. Woodson,* 330 So.2d 152 (Fla. 4th DCA 1976), for the proposition that a request for a curative in

Reference to pages 17 through 19 of the original Petition for Certiorari in the case at bar will reveal that the intolerably prejudicial impact of repeatedly bringing out the Petitioner's silence after *Miranda* warning in the presence of the jury outweighed any arguable theory of relevence. Most of the considerations outlined in *Hale* and which make such silence insolubly ambiguous apply to the case at bar. The evidence simply should have gone out.

The repeated errors complained of in the Petition for Certiorari are not harmless. It cannot be said beyond a reasonable doubt that the constitutional violations did not contribute to the conviction. *Chapman v. California,* 386 U.S. 18, 23 (1967). The Court should refer to pages 19 through 20 of the original Petition for Certiori regarding the State's harmless error argument. Florida's representation to the Court that the Petitioner never challenged the sufficiency of the evidence is patently contrary to the record. In addition to the effect of the Petitioner's plea of not guilty, the Petitioner challenged the sufficency of the evidence at trial, in closing argument, and in his motion for a new trial. In his closing argument, defense counsel argued that the degree of force necessary to convict for the life felony charged necessarily involved ". . . significant force, breaking a nose and teeth, using guns and knives, as opposed to slight force." Tr. 409. The distinctions in the degree of force used make a difference between a life felony punishable by a minimum of 30 years in jail, and a lesser felony punishable by a maximum of 15 years in jail with no required minimum. The State's case regarding the degree of force used was not overwhelming, as even the Prosecutor indicated in his closing argument at pages Tr. 398 through 400. The Prosecutor stated that the only area of the case which left open a reasonable doubt was the degree of force alleged. Tr. 398. he stated, "There is no evidence of any serious physical injury, and she [the victim] didn't claim that there was." Tr. 399. The Prosecutor then discussed the appropriateness of a lesser included offense. Tr. 400.

struction must also be simultaneously made with the objection and motion for mistrial. Even a cursory reading of *Woodson* reveals that the State has misread the case.

Looking at these cases, all that is required in order to preserve a federal question for review under a contemporaneous objection rule is a timely objection which calls " . . . the matter to the court's attention so that the trial judge will have an opportunity to remedy the situation." *Estelle v. Williams,* 425 U.S. 501 508, at footnote 3 (1976). This is also the position of *Wainwright v. Sykes,* 433 U.S. 72, 88-89 (1977). *Wainwright* noted that a contemporaneous objection would also enable the record to be made with respect to the constitutional claim when the recollections of the witnesses were freshest, and would force the prosecution to take a hard look at its hole card to determine the possibility of an appellate reversal or the ultimate issuance of a federal writ of habeas corpus.

A careful reading of *Clark v. State,* 363 So. 2d 331 (Fla. 1978), reveals that a motion for mistrial need only be made if an objection is sustained. The Supreme Court of Florida noted that ". . . the important consideration is that the defendant retain primary control over the course to be followed in the event of such error." *Id.,* at 335. In other words, if the defendant objects and his objection is sustained, he is at a crossroads. He certainly has a right to a fair trail free from the pressures of constitutional error, which may conflict with his valued right to have his trial completed by the particular tribunal originally chosen. The defendant cannot have two bites at the same apple by proceeding to the end of the trial in the hopes of an acquital, and, in the event of a conviction, assume that he will prevail on appeal. If he wants a mistrial, he must move for it at that time. If he fails to do so, he will presumably have opted to complete the case with the existing jury. Further, if he wants the lesser remedy of a curative instruction, he must, under *Woods,* tell the trial judge.

If the objection is overruled, it becomes an exercize in futility to move for a mistrial, as the trial court is not realistically going to suddenly change its ruling due to the magic words of requesting a mistrial. The purpose of objection is to bring the matter to the trial court's attention and give the trial court the opportunity to prevent or correct error. As Justice Alderman noted in *Clark,* "if the court finds that there was not [improper comment on the defendant's silence], the objection should be overruled. In that event, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal." *id.,* at 335. See also, pages 333-334. *Clark* considered two separate cases in which both defendants failed to even object. The Supreme Court of Florida held that the failure to object was the basis for refusing to grant review.

In the same year that *Clark v. State* was rendered by Justice Alderman, he wrote a concurring opinion in *Willinsky v. State,* 360 So.2d 760, 763 (Fla. 1978), which sheds light on the meaning of his *Clark* opinion as it applies to the case at bar. In *Willinsky,* the prosecutor impeached the defendant's trial testimony by asking him why he did not relate his exculpatory story at his preliminary hearing, at which prior proceeding he refused to testify. This impeachment was followed by an objection from defense counsel, which was overruled. There was no motion for a mistrial. The Supreme Court of Florida held that such a violation was fundamental error, and reversed *Willinsky's* conviction.

Justice Alderman concurred specially in the result, even though he did not feel that the error was fundamental:

> I concur in the denial of the petition for rehearing because not only was the error in the case harmful, but also, counsel for defense made a contemporaneous objection to the comment on defendant's silence, which objection was overruled by the trial court. *Id.*, at 763.

The case at bar is considerably stronger in terms of preserving the federal question than the procedure employed by *Willinsky's* defense attorney at trial. In the case at bar, two objections to the Fifth Amendment and Due Process violations were made during the proffer of the challenged testimony. The entire proffer was objected to by defense counsel on the basis of *Miranda v. Arizona.* No purpose whatsoever would have been served by simultaneously moving for a mistrial when the trial court repeatedly overruled these objections. The purpose of the contemporaneous objection rule was fully met by apprising the trial judge on four different occasions of the Petitioner's objections to this testimony. A standing objection was employed, and a motion for mistrial was made outside the presence of the jury between objections to avoid additional prejudice to Petitioner after the trial court ruled. No legitimate State interest is served by an artificial rule requiring an objection, a motion for mistrial, and request for curative instructions in the same breath, when the transcript clearly reveals that the trial court was repeatedly put on notice, and Florida has no such rule. See *Castor* v. *State,* 365 So.2d 701, 703 (Fla. 1978), for terse analysis of the contemporaneous objection rule:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. * * * to meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.

CONCLUSION

For the foregoing reasons in this Reply, and the reasons set forth in the main petition, the writ of certiorari should be granted and the decision below should be summarily reversed for a new trial.

Respectfully submitted,

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